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21 September 1976

MEMORANDUM FOR: Deputy Director of Central Intelligence

FROM: Anthony A. Lapham  
General Counsel

SUBJECT: Review of Issues Re Guidance to Employees on Legalities

1. In your note to me dated 27 August, you referred to the "general problem of our ability to communicate to employees what is and is not permissible activity under guidelines established by the Executive Order and as they are evolving in the Congress, the Courts, the Intelligence Oversight Board, and elsewhere." You asked that I take the lead in bringing this subject before the EAG, and you identified three questions for discussion:

a. What guidance is available to employees explaining our current understanding of the issues of propriety or legality they may face?

b. Is the available guidance sufficiently clear at this point that a "reasonable man" can proceed with an assignment with a good understanding of where he could face problems?

c. Do the answers to these questions suggest the need for additional steps to improve the downward flow of information? If so, what should we do? If not, what interim advice can we provide?

2. The Agency of course derives its basic authority from the National Security Act of 1947 and the CIA Act of 1949, and from the implementing NSCIDs, DCIDs, and Executive orders, principally E. O. 11905, which contains both the most complete statement of the activities in which the Agency is authorized to engage and the most complete set of explicit restrictions applicable to those activities. These external mandates are translated into internal guidance in the form of Headquarters and field regulations (a total of five volumes), Headquarters and field notices, and Headquarters and field manuals, which collectively make up the Agency regulatory system -- that is, the system of written

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policies and procedures that apply on an Agency-wide basis. The administration of this system is the responsibility of the DDA. In addition, there are numerous directives, informational notices, and explanatory and interpretative materials issued by the Directorates, independent offices, and other components, all intended for the guidance of personnel under the supervision of the issuing officials. Formal training courses and various ad hoc techniques also contribute to the sum total of the information that is available to employees respecting the Agency's proper functions and the limits of permissible activity. Moreover, some further contribution along these lines has presumably been made by widely publicized material, such as the final reports of the Rockefeller Commission or Church Committee, but obviously we can do no more than note the potential educational value of those reports. We can hardly claim that they are elements of our scheme of control and management.

3. An appraisal of the overall quality of the Agency's internal guidance system would be an enormous undertaking. To begin with, there are no textbook definitions of quality in this context, and the apparently appropriate standards are to some extent in competition with each other. Assuming that the ultimate objective is to communicate effectively to employees the information they need to have in order to conduct themselves within the bounds of legality and propriety, it seems to me that our system should satisfy the following criteria:

- a. Completeness. This standard has to do with coverage. Is guidance provided on a broad enough range of matters? Does it deal in affirmative terms with what is permitted, as well as in negative terms with what is prohibited?
- b. Accuracy. This standard has to do with validity of content. Is the guidance legally correct?
- c. Clarity and simplicity. This standard has to do with style and succinctness. Is the guidance understandable and has an effort been made to separate the essential from the nonessential?
- d. Organization and emphasis. This standard has to do with format. Is the material arranged and indexed in such a way as to facilitate its use, and is the more important guidance highlighted somehow so as to be conspicuous to the employee even if he notices nothing else?
- e. Relevance. By my conception, this standard has to do with distribution. Does the guidance go to those who have a true need for it in the performance of their duties, and not to those who could fairly regard it as irrelevant extra reading?

f. Currency. This standard is closely related to the accuracy standard. Is the guidance reviewed periodically and updated when it has been overtaken by events (judicial decisions, OGC opinions, etc.)?

g. Penetration and impact. This standard has to do with results. Does the system work? How is it perceived by the employees? Do they think they are at sea without sufficient guidance or do they feel snarled up in overly complex and bureaucratic procedures?

4. It might well be that it would make sense to take a fresh look at the whole of our regulatory system in light of the standards I have outlined or some better standards that might be devised. But I think at this point it would be unwise to invest in such an ambitious project. There certainly would be no early returns, and in any event it is not now demonstrable that we face a serious problem with respect to our whole program of internal guidance, let alone a problem that calls for massive reform.

5. In my judgment any initial inquiry should be more narrowly confined. STATINTL  
It would focus, in my view, on E.O. 11905, and particularly Section 5 of that order, which deals with restrictions on intelligence activities, and on  which incorporates, and to some extent elucidates, the Section 5 restrictions (and includes as annexes the various procedures approved by the Attorney General pursuant to Section 5 or other provisions of the Executive Order) and then goes on to spell out other restrictions, relating for example to polygraphing or relationships with the press and the clergy, not found in the Executive Order but rather based on the conclusions of the Rockefeller Commission or on our own perceptions of proper restraints on intelligence activities.

STATINTL 6. There are a number of considerations that support the appropriateness of an inquiry into the question of whether, so far as concerns E.O. 11905 and  we have adequately communicated the message to the troops, and whether the guidance we have provided needs to be supplemented. First, E.O. 11905 stands in effect as our charter, reflecting in more or less specific terms the Executive branch understanding of the broad generalities expressed in the National Security Act of 1947. Therefore, the provisions of the Order are not in any sense of incidental or secondary importance. They are fundamental. Second, the restrictions set forth in the Order are addressed to the very issues, mainly having to do with the privacy rights of U. S. persons and the independence of U. S. institutions thought to be threatened by CIA, that became the major center of public controversy and concern in the recent period of investigation. As a consequence of this fact, the flash potential of any violations is very high, and if we are not vigilant in our internal enforcement, we will have to pay yet another heavy price in public and congressional

reaction. Sweeping legislation is apt to be the outcome if we are unable to manage ourselves under the Executive Order. Third, the restrictions are not the straightjacket that is often supposed, and the Executive Order may gain wider acceptance and appear less frightening if we can succeed in making its provisions clearly understood. And fourth, from a public relations standpoint, if not because of the public commitments that have been made both by you and by the DOD, we cannot afford not to be in a position to assert with confidence that our employees have been fully and carefully instructed as to the nature of applicable restraints on intelligence activities.

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7. My impression is that our efforts to communicate the E.O. 11905 message to the field have been somewhat haphazard. As an example, HR [ ] has not yet been converted into a field regulation. Implementing guidance has thus been left to the Directorates, independent offices, and other components. In some cases, as I understand it, the restrictions set forth in Section 5 of E.O. 11905 have been communicated to the field, together with the various procedures approved by the Attorney General, but the other restrictions enumerated in HR [ ] have not been so communicated. So far as this basic guidance is concerned, I think some centralized effort and direction is probably required.


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8. For the rest, so far as concerns guidance on matters other than those with which [ ] deals, my instinct is that it would be a mistake to issue broadside new sets of directives which would go to all employees and would attempt to summarize all of the rules applicable to any and all of the duties faced by the totality of our employees. Employees in the business of disseminating are not in the business of recruiting agents and do not need to know the rules that the recruiter must know. Employees engaged in recruiting are not involved in procuring equipment and do not need expertise as to the rules applicable to those who are so engaged. I suggest that the solution might take the form of developing a machinery which would be responsive to the guidance needs of categories of employees. Perhaps we should establish a group or committee with representatives from the Directorates, the General Counsel, and perhaps other components. The Directorate representative would be able to indicate the areas which categories of employees in his Directorate find troublesome. The group and, in particular, the General Counsel representative would attempt to develop statements which could be related to that category of employees and which would be in the nature of a manual for them by which they would know how to perform their duties. The group would set out in non-legal terms, and hopefully in brief form, instructions useful for case officers, other instructions useful for procurement officers, etc. The instructions would reflect both legal requirements and "propriety" considerations, and would distinguish between the two. The program could

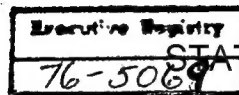
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go forward on a continuing basis, with the most troublesome areas of activity receiving priority attention. The guidance documents should be so organized that when, for example, a new court decision is issued or E.O. 11905 is revised or for other reasons the governing rules change, the standing instructions to the employees whose duties are affected by the new rules could be and would be quickly modified and made available to those employees. In effect, loose-leaf manuals, with periodic updating, could be developed.

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Anthony A. Lapham

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27 August 1976

NOTE FOR: General Counsel

SUBJECT : Review of Issues re Guidance to Employees on Legalities

Tony:

We have talked in the EAG about the general problem of our ability to communicate to employees what is and is not permissible activity under guidelines established by the Executive Order and as they are evolving in the Congress, the Courts, the Intelligence Oversight Board, and elsewhere. I understand the wisdom in your reminder that experience and the passage of time are required to give meaning to regulatory words and that there can be peril in precipitous efforts to define such words. At a minimum, however, I am convinced that it is very important for us to try in every reasonable way to ensure that we are communicating to our people some understanding of the restrictions and permissions they confront, even if precision is not possible. I believe our people would be as impressed and as understanding as I was, for example, in hearing your wise disquisition to the EAG on this point earlier this week.

I would like, therefore, to ask you to take the lead in bringing a discussion of this subject before the EAG. It may well be that one session will not be enough, but to get the ball rolling, I would like our initial discussion to include the following points:

- 1) What guidance is available to employees explaining our current understanding of the issues of propriety or legality they may face?
- 2) Is the available guidance sufficiently clear at this point that a "reasonable man" can proceed with an assignment with a good understanding of where he could face problems?
- 3) Do the answers to these questions suggest the need for additional steps to improve the downward flow of information? If so, what should we do? If not, what interim advice can we provide.

I know this is not an easy assignment, but I also know we can count on you to illuminate for us a very difficult and complex problem area. We have tentatively scheduled an EAG session on this for 9 September. Because John Waller is also interested in this issue, I will ask him to attend this session as well.